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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

MAXIMILIAN KLEIN, et al.,

Plaintiffs,

vs.

FACEBOOK, INC.,

Defendant.

This Document Relates To: All Actions

Consolidated Case No. 5:20-cv-08570-LHK

**CONSUMER CLASS PLAINTIFFS' AND  
ADVERTISER CLASS PLAINTIFFS'  
SUPPLEMENTAL BRIEF REGARDING  
GOVERNMENT ORDERS**

The Hon. Lucy H. Koh

Hearing Date: July 15, 2021 at 1:30 p.m.

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Facebook claims that the District Court for the District of Columbia’s (“D.D.C.”) dismissal of the government antitrust lawsuits against Facebook requires dismissal of these private actions. Dkt. 114 at 5. Both the Consumer Complaint (“CC”) and the Advertiser Complaint (“AC”), however, present materially different legal theories and factual allegations that the D.D.C. indisputably did not (and could not) resolve. And those decisions reject some of the same arguments Facebook advances here, further highlighting why its motion, Dkt. 97 (“Mot.”), should be denied.

# **I. FEDERAL TRADE COMMISSION ORDER**

## **A. The FTC Order Sustained the FTC’s PSN Market Definition**

**Consumers.** In finding the “Personal Social Networking Services” market plausible, the D.D.C. *rejected* many of the arguments that Facebook repeats here. *Fed. Trade Comm’n v. Facebook, Inc.*, No. 20-cv-03590 (D.D.C. June 28, 2021), Dkt. 73 (“FTC Order”) at 23.

Although there are some differences, the FTC’s PSN Market definition is highly similar to Consumers’ Social Network Market definition. In finding the PSN Market plausible, the D.D.C. necessarily disposed of Facebook’s argument that such a market definition fails because the products in it are purportedly “free and available in unlimited quantities.” FTC Order at 23; Mot. at 15; Dkt. 109 (“Opp.”) at 16. The D.D.C. explicitly rejected Facebook’s argument that market definition requires reference to demand cross-elasticity, even where reasonable interchangeability is alleged. FTC Order at 24; Mot. at 17–18; Opp. at 17–18. And the D.D.C. also rejected Facebook’s arguments regarding what firms are in the PSN Market and its attempts to inject in “other possible substitutes,” all of which Facebook improperly parrots here. FTC Order at 25–26; Mot. at 15–18; Opp. at 16–18.

**Advertisers.** The FTC did not allege, and the D.D.C. did not address, Advertisers’ Social Advertising Market. However, the D.D.C. rejected Facebook’s factual disputes concerning the FTC’s well-pleaded allegations that consumers would not substitute other services. FTC Order at 25. In this case, Facebook “directly takes aim,” *id.* at 25, at Advertisers’ allegations that search and display ads are not reasonable substitutes. Mot. at 15; *see* AC ¶¶ 413–444. Per the FTC Order, it is improper at this stage “to engage in the sort of ‘deeply fact-intensive inquiry’” raised by Facebook regarding market definition. FTC Order at 25. This underscores the flawed premise of Facebook’s arguments on this issue here.

1 **B. Determinations Regarding FTC’s Monopoly Power Allegations**

2 The D.D.C. determined that the FTC’s “mere[]” allegations that Facebook has “maintained  
3 a dominant share” of the PSN Market “in excess of 60%” and that “no other social network of  
4 comparable scale exists in the United States” do “not even provide an estimated figure or range for  
5 Facebook’s market share at any point over the past ten years[.]” FTC Order at 27, 32.

6 **Consumers.** The D.D.C. rejected the FTC’s “exceeds 60%” allegation as “bare assertions”  
7 of the minimum share usually required to establish monopoly power. FTC Order at 19, 28  
8 (recognizing 60–65% usually required, collecting cases involving similar “threadbare recital[s]”).  
9 But the CC does not allege merely the minimum share legally required; it alleges Facebook “has  
10 market share of at least 85% of the Social Media Market” and that its share in the Social Network  
11 Market “is higher” since the latter is a part of the former.<sup>1</sup> CC ¶¶ 56, 71, 286. As explained below,  
12 the CC also alleges specific facts of Facebook’s share, not threadbare recitals of the legal minimum.

13 The D.D.C. noted that while the FTC’s lone “exceeds 60%” allegation “might sometimes be  
14 acceptable” in a “case involving a more traditional goods market,” it was not there given the PSN  
15 Market definition and the quantum of share alleged. FTC Order at 2, 27–28 (citing Phillip E. Areeda  
16 & Herbert Hovenkamp, Antitrust Law § 531 (4th ed. 2014)). The treatise upon which the D.D.C.  
17 relied rejects any “sliding scale” but explains that whether a “minimum share” is sufficient  
18 “depends” on “confidence” as to market definition, such that a higher share may be needed to bolster  
19 allegations of monopoly power in an “idiosyncratically drawn” market. Phillip E. Areeda & Herbert  
20 Hovenkamp, Antitrust Law § 532a (5th ed. 2021). The D.D.C. did *not*, however, state that a factual  
21 allegation of a specific market share, such as here (85%), can be disregarded. Nor could it. *See Bell*  
22 *Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (factual allegations “taken as true”); Areeda,  
23 Antitrust Law § 532a (“Once a market is defined, no matter how tenuously, courts examine market  
24 share on the assumption that all market definitions are alike.”). Instead, the D.D.C. faulted the FTC  
25 for alleging merely the legal minimum of “exceeds 60%,” failing “to allege that Facebook has ever  
26 . . . had something like 85% or even 75%” share, and failing to explain “which firms make up the

27  
28 <sup>1</sup> Consumers also assert standalone attempted monopolization claims (which the FTC did not) for each market. *See Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995) (44% market share “sufficient as a matter of law” to support attempt claim, and even 30% possibly sufficient).

1 remaining 30–40%[.]” FTC Order at 30–31. Here, the CC alleges that Facebook controls more than  
 2 85% of the Social Media and Social Network Markets, past competitors are defunct, and current  
 3 competitors are “only a very small drop in the ocean[.]” CC ¶¶ 56, 68, 71, 140, 286.

4 The D.D.C. also explained that the FTC did not “offer any indication of the metric(s) or  
 5 method(s) it used to calculate Facebook’s market share[.]” FTC Order at 2. Consumers provide such  
 6 support for their specific share estimations including, *e.g.*, Facebook’s *own* estimation that it is  
 7 “95% of all social media in the US.”<sup>2</sup> CC ¶ 77. The CC also alleges that “more than 80% of the time  
 8 that consumers . . . spend using social media is spent on Facebook and Instagram,” explaining how  
 9 **Facebook** values and uses “time spent” to measure competitive performance, secretly gathering  
 10 Consumers’ data as to their time spent on other apps. *Id.* ¶¶ 78, 163–65, 211, 286; *accord* Dkt. 97-  
 11 6 at 8 (internal presentation cited at CC ¶ 77, and attached to Facebook’s motion, tracking that  
 12 “Facebook has ~125x the amount of *minutes spent* per user” compared to Google+). The CC cites  
 13 documents—*e.g.*, the House Report and an article Facebook attached to its motion (Dkt. 97-4 at 87–  
 14 88)—which use “time spent” to calculate market share.<sup>3</sup> To the extent the D.D.C. suggested this  
 15 metric—which the FTC “sa[id] nothing about”—may be inapt for the PSN Market because “some  
 16 of the features offered by a Facebook” are not “part of” its PSN-services offerings,” FTC Order at  
 17 29–30, the CC does not exclude those features from Consumers’ markets. CC ¶¶ 15, 56, 59, 262.

18 The CC also supports its share estimates using Facebook’s high share of ad revenue. CC ¶¶  
 19 80, 286. The D.D.C. suggested that ad revenue itself “cannot be the right metric for measuring  
 20 market share here,” as it is “earned in a separate market . . . the market for advertising.” FTC Order  
 21 at 29. But the CC does not allege that Facebook’s ad revenue share *is* its share of the Social Network  
 22 or Social Media Markets; the CC alleges Facebook’s ad revenue share is probative of Facebook’s  
 23 Social Media Market share, since the more users a social network or social media app has, the more  
 24 popular it is with advertisers. CC ¶¶ 80, 83, 86; *cf. Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*

26 <sup>2</sup> Facebook now disclaims its own internal estimates as “nearly a decade old,” “not track[ing]  
 27 Users’ alleged market definition,” and “irrelevant.” Mot. at 19. Its own estimation that it had near-  
 total power in some market *it* defines as “social media” is certainly relevant. *Cf.* FTC Order at 27.

28 <sup>3</sup> The “95% of all social media” presentation cited at CC ¶ 77, which Facebook now disclaims but  
 attached to its motion, *itself* uses “monthly total minutes of use” to calculate share. Dkt. 97-5 at 3.

1 of *Univ. of Oklahoma*, 468 U.S. 85, 111 (1984) (that firm “uniquely attractive” to advertisers  
 2 “support[s] conclusion” that firm “possesses market power” in broadcasting market).

3 **Advertisers.** The D.D.C. did not address Facebook’s monopoly power in the Social  
 4 Advertising Market. Nor did Facebook challenge Advertisers’ allegations here. *See generally* Mot.  
 5 at 18; Opp. at 20 n.21; AC ¶¶ 61–83, 445–60 (Facebook’s monopoly power based on its 86% share  
 6 of ad revenues, ability to raise prices year after year, and protection by high barriers to entry).

## 7 **II. STATES ORDER**

### 8 **A. Determinations Regarding Facebook’s “Platform” Access Policies**

9 The D.D.C. found the States’ Section 2 claim based on Facebook’s third-party “Platform”  
 10 policies failed under “refusal to deal” and “conditional dealing” principles. *State of New York et al.*  
 11 *v. Facebook, Inc.*, No. 20-cv-03589 (D.D.C. June 28, 2021), Dkt. 137 (“States Order”) at 22–23.

12 **Consumers.** Consumers’ claims do not implicate Facebook’s “Platform” policies. Opp. at  
 13 27. Instead, Consumers challenge Facebook’s deception of the market and larger course of conduct  
 14 involving Facebook’s serial acquisitions and use of deceptively-obtained data to identify  
 15 competitors and inform those acquisitions. *Id.* at 24. The D.D.C., by contrast, explicitly noted that  
 16 “Facebook’s data-collection and -use practices . . . are *not the subject of this action.*” *Id.* at 7.

17 **Advertisers.** The D.D.C.’s refusal to deal analysis does not weigh against Advertisers’  
 18 Section 2 claims. It in fact supports the AC’s refusal allegations, as the D.D.C. stated specific  
 19 revocations of API access to applications deemed competitive could violate Section 2, but held those  
 20 potentially unlawful refusals were not recent enough to justify injunctive relief. *See* States Order at  
 21 31–35. The AC does not make a “policy” argument like the one rejected in the States Order, *see id.*  
 22 at 28–30, nor does the AC rely on a conditional dealing theory under *Lorain Journal*, *see id.* at 35–  
 23 40. Rather, the AC alleges, as to Platform conduct, each of the *Aspen* elements with particularity, as  
 24 well as anticompetitive agreements for advertising purchases and data sharing that directly inflated  
 25 social advertising demand and prices and reinforced Facebook’s DTBE. Opp. at 5–6, 25–26.

### 26 **B. Determinations that Injunctive Relief as to Individual Acquisitions Barred by Laches**

27 Since the States sought only injunctive relief and divestiture, their Section 2 and Clayton Act  
 28 Section 7 challenges to the Instagram and WhatsApp acquisitions were barred by laches, as the

1 States did not respond to Facebook’s “timeliness arguments” and “rais[e] (or even hint[] at) a factual  
2 dispute as to” accrual or provide “a reasonable justification” for delay. States Order at 40, 66.

3 **Consumers.** The D.D.C.’s findings as to the States’ equitable, acquisition claims do not  
4 address Consumers’ standalone claims based on deception (which are timely). Opp. at 8, 21–24.

5 Moreover, the CC does not independently challenge individual acquisitions (such as under  
6 Section 7); it challenges Facebook’s *serial* acquisitions of rivals as part of a multi-part scheme,  
7 along with non-acquisition conduct like deceiving Consumers and using their data to spy on  
8 competitors.<sup>4</sup> Opp. at 24–25. Whereas the D.D.C faulted the States since neither the “buy” nor the  
9 “bury” portions of their course of conduct theory occurred during the limitations period, States Order  
10 at 59–65, the CC details how—in furtherance of the different scheme Consumers allege—Facebook  
11 engaged in additional, non-acquisition acts *during the limitations period* (deception and spying).  
12 See CC ¶¶ 156–58, 168, 209, 212, 238(n)(o); *Oliver v. SD-3C LLC*, 751 F.3d 1081, 1086–87 (9th  
13 Cir. 2014) (equitable antitrust claims timely if based on acts occurring within limitations period).  
14 And while the fact of acquisitions was known, that they were enabled by deceptive conduct, and  
15 part of a broader anticompetitive scheme, was not until within the limitations period. Opp. at 15, 25.

16 In all events, the D.D.C. repeatedly noted that it was only adjudicating *equitable* claims.  
17 States Order at 2, 34, 40. As such, laches—which considers both delay *and* prejudice—governed  
18 those claims. *Id.* at 43. But the CC also asserts claims for *damages*, including for different harms—  
19 *e.g.*, Consumers not receiving adequate compensation for their data—which continued into the  
20 limitations period. CC ¶¶ 11, 223–26; Opp. at 4–5, 8–9. The D.D.C.’s concerns as to “prejudice to  
21 Facebook,” States Order at 45–47, are thus no bar to the damages claims here. See *Oliver*, 751 F.3d  
22 at 1085–86, 1086 n.4 (“Unlike [antitrust] damages claims” subject to “statute of limitations,”  
23 equitable antitrust claims subject to laches, including prejudice element).

24 **Advertisers.** Because Advertisers do not seek injunctive relief based on the Platform or  
25 acquisition conduct alleged by the States, the D.D.C.’s laches analysis is irrelevant. Advertisers’  
26 damages claims are timely under the continuing violation and fraudulent concealment doctrines.

27  
28 <sup>4</sup> As such, even if certain individual acquisitions are not independently actionable, they are germane  
to Consumers’ claims. Opp. at 25 (course of conduct); see also *Dial Corp. v. News Corp.*, 165 F.  
Supp. 3d 25, 37–38 (S.D.N.Y. 2016) (pre-limitations acts “material to” damages period injuries).

DATED: July 5, 2021

Respectfully submitted,<sup>5</sup>

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1                                   **ATTESTATION OF STEPHEN A. SWEDLOW**

2           This document is being filed through the Electronic Case Filing (ECF) system by attorney  
3 Stephen A. Swedlow. By his signature, Mr. Swedlow attests that he has obtained concurrence in  
4 the filing of this document from each of the attorneys identified on the caption page and in the above  
5 signature block.

6           Dated: July 5, 2021

7           By /s/ Stephen A. Swedlow

8                                   Stephen A. Swedlow

9  
10                                  **CERTIFICATE OF SERVICE**

11           I hereby certify that on this 5th day of July 2021, I electronically transmitted the foregoing  
12 document to the Clerk's Office using the CM/ECF System, causing the document to be  
13 electronically served on all attorneys of record.

14  
15                                   By /s/ Stephen A. Swedlow

16                                   Stephen A. Swedlow